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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ADAN FLORES, Defendant and Appellant.	H033212 (Monterey County Super. Ct. Nos. SS061706A, SS051910A)

Defendant Adan Flores was convicted after jury trial in case No. SS061706A of second degree murder (Pen. Code, § 187),[1] and unlawful possession of a firearm (§ 12021, subd. (a)(1)). The jury further found that defendant personally used a firearm during the commission of the murder (§ 12022.53, subd. (d)), and that both offenses were committed for the benefit of or in association with the Sureño criminal street gang (§ 186.22, subd. (b)). Defendant admitted having served a prior prison term (§ 667.5, subd. (b)). In case No. SS051910A, defendant entered a negotiated guilty plea to possession of methamphetamine for sale, on condition that he receive a two-year sentence to be served concurrent with the sentence in case No. SS061706A. The trial

[1] Further unspecified statutory references are to the Penal Code.

court sentenced defendant in the two cases to 46 years to life in prison and imposed restitution fines of $10,000 and $400.

On appeal in case No. SS061706A, defendant contends the trial court erred by: (1) failing to give, and his attorney rendered ineffective assistance in failing to request, CALJIC No. 2.71; (2) giving CALCRIM No. 3472; (3) excluding some proffered defense evidence; (4) misadvising the jury on the provocation element of voluntary manslaughter with CALCRIM No. 570; and (5) admitting unnecessary and inflammatory gang evidence. He further contends that the judgment must be reversed due to cumulative prejudice and that the one-year term for the prison prior should be stricken because the trial court failed to fully inform him of his trial rights before he admitted the prior. In case No. SS051910A, defendant contends that the court erred in imposing the $400 restitution fine. We disagree with all of defendant's contentions and, therefore, will affirm the judgment.

BACKGROUND

Defendant was charged by information filed October 20, 2005, in case No. SS051910A, with possession of methamphetamine for sale (Health & Saf. Code, § 11378; count 1), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 2), and unlawful possession of ammunition (§ 12316, subd. (b)(1); count 3). The information further alleged that defendant had served a prior prison term (§ 667.5, subd. (b)). Defendant remained out of custody on bail until he was arrested on new charges.

Defendant was charged by first amended information filed May 29, 2008, in case No. SS061706A, with first degree murder (§ 187, subd. (a); count 1), and possession of a firearm by a felon (§ 12021, subd. (a)(1); count 2). The information further alleged that defendant personally discharged a firearm in the commission of the offense in count 1, that both offenses were committed for the benefit of or in association with the Sureño criminal street gang, and that defendant had served two prior prison terms. On June 2,

2008, the prosecution informed the court that it was only seeking one prior prison term enhancement. Defendant admitted having a prior felony conviction for purposes of both the prior prison term enhancement and the section 12021 count.

The Prosecution's Case

Jose Carrillo was shot and killed outside a 7-Eleven store in Salinas on the night of May 14, 2006, after going to the store with his cousins Ricardo and Shantel, and Shantel's friend Anthony. [2]

Ricardo met Carrillo through friends, then Ricardo's sister married Carrillo's cousin. Ricardo and Carrillo spent part of the evening of Sunday, May 14, 2006, together. Shantel spent part of that same evening with her friend Anthony.

Late that night, Shantel drove Anthony, Carrillo, and Ricardo to a 7-Eleven store in Salinas. None of them had any weapons on them. A Jeep drove into the store's parking lot about the same time they did. One of the men in the Jeep hung out a window and said, " 'Hey, what's up?' " Anthony, who was wearing a red shirt but who testified at trial that he was not a Norteño gang member, responded, "hey," and then went inside to buy Shantel cigarettes and a bottle of water. Ricardo went inside to buy gum because his mouth was dry from having used methamphetamine earlier that night. Shantel and Carrillo stayed in her car.

Anthony got a bottle of water and then went to the check-out counter to get a pack of cigarettes and to pay for his items. Three men from the Jeep entered the store. As Ricardo was standing in an aisle choosing his gum, one of the three men walked in front of him and two of them surrounded him for a few seconds. Ricardo chose his gum, went to the counter and handed the gum to Anthony, asking him to pay for it. One of the three

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[2] Some of the witnesses were identified at trial by their first names only.

men from the Jeep stood by the counter, the second one, defendant, stood by the door, and the third one stood nearby.

Carrillo entered the store while Shantel remained in her car. Carrillo chuckled and said to the three men from the Jeep, " 'you guys couldn't get beer?' " Carrillo then stood to the side and back of Ricardo as Anthony was talking to Jon Best, the store clerk. The three men from the Jeep stared at them. Defendant, who had a gang tattoo on the back of his head, asked where they were from. When neither Ricardo nor Carrillo answered, defendant asked the question again. When the question was asked a third time, Carrillo responded, "North side." A short fight ensued between Carrillo and two of the men from the Jeep, after which the third of the three men threw a wet-floor cone at Carrillo's head. Best saw this and pushed the button under the counter to activate the store's silent alarm.

Anthony heard defendant say, " 'let's take this outside.' " The three men from the Jeep then left the store. Ricardo saw that Carrillo was angry and he followed Carrillo outside. When Ricardo saw a gun in defendant's hand, Ricardo turned around and ran back inside the store. He then heard two shots. Best heard the shots and ducked down behind the counter. Anthony heard the shots while still inside the store, and from his position he could see the shooter firing the gun. Carrillo stumbled back inside the store and fell to the floor.

Shantel ran inside the store and tried to put pressure on Carrillo's wounds. Best stood back up, saw Carrillo and Shantel, and called 911. Shantel and Anthony yelled at Best to lock the store door, but Best said that he did not have the key. Shantel called 911 using Anthony's cell phone.

Around 12:04 a.m. on May 15, 2006, Salinas Police Officer Gerard Ross heard a broadcast of a shooting at the 7-Eleven store. He was the first officer to arrive at the store. Shantel's car was the only one parked outside. Carrillo was just inside the store, lying on his back in the aisle to the right of the front door. He was still breathing, and

Shantel had her hand on his wound trying to keep it from bleeding. Medical personnel arrived fairly quickly, but they were not able to save Carrillo.

Carrillo had been shot in the lower abdomen and in the back of the right shoulder. One bullet had gone through both lungs and his aorta and a second bullet had gone through his abdomen and pelvic bone. Both bullets, which were from a .357 or a .38-special-caliber revolver, were recovered during his autopsy. The first wound had caused Carrillo's rapid fatal blood loss, but the shoulder wound would not have otherwise been fatal. Toxicology tests determined that Carrillo had methamphetamine and its metabolite, amphetamine, in his blood. The amount was "consistent with street . . . methamphetamine abuse. Which can be fatal in and of itself on occasions." Carrillo had four dots tattooed on his left elbow and one dot tattooed on his right elbow that were probably visible that night given the clothes he had been wearing.

Detective Thomas Larkin was called in around 1:00 a.m. to investigate the shooting. He determined that the store had a surveillance system that used a number of different cameras, and he reviewed the surveillance videos of the shooting and the suspects' Jeep. He then took the system's computer tower to the forensic lab. Still photos were prepared of the suspects from the video.[3] No weapons of any kind and no bullet casings were found in the store or in Shantel's car. A small plastic panel from a Jeep was found in one of the parking stalls in front of the store.

Defendant was identified as the suspected shooter based on the tattoo on the back of his head and the Jeep seen in the store's surveillance videos. Defendant was from Fontana, but was living with relatives in Salinas. He has a tattoo on the back of his head that says "DBS," which stands for "Diablos," a Southern California Sureño gang he belonged to. The Jeep was registered to Clarissa Gutierrez, defendant's girlfriend, and

[3] The record on appeal does not include the surveillance cameras' videos, but does include four notebooks of still photos prepared from the videos.

defendant had been seen driving the Jeep. A photographic lineup was prepared that included defendant's photo. Ricardo was shown the lineup and he identified defendant's photo as that of one of the men involved in the shooting. He was not asked to, and he did not identify defendant at trial. Anthony did not identify anybody in the photographic lineup because he did not want to be involved, but he identified defendant at trial as the man who shot Carrillo. Shantel did not testify.

When defendant was arrested inside his grandparents' residence on May 18, 2006, the Jeep was parked outside and defendant's cell phone was in the Jeep. The plastic panel found at the 7-Eleven store was missing from the passenger door of the Jeep. Defendant denied being involved in the shooting incident. Gang writings were found inside a folder in the closet of defendant's bedroom in the residence he shared with Gutierrez and her mother, and gang photographs of defendant were also found inside that residence. A weight-lifting bench with "Demon" and "DBLS" written on it in blue was found in the back of the residence. "Demon" is defendant's older brother's gang moniker.

Saul Granados was identified as a second suspect in the shooting, the one who threw the floor cone at Carrillo's head, but the police could not identify the third suspect. Granados and a cohort had been arrested and convicted in 2005 for being gang members in possession of a loaded firearm and other contraband. Granados was arrested on June 1, 2006, in connection with this case and his residence was searched. There the police found the jersey with the number "69" and the word "joker" that Granados had been wearing during the shooting incident, as well as a number of gang CDs, CD holders, and drawings, and a copy of Carrillo's newspaper obituary. Granados has "kill them all" tattooed across his abdomen, and "X" and "3" tattooed on his arm. Officer Royce Heath, a former Salinas Police Department gang intelligence officer, testified that, in his opinion, Granados was an active participant in the Sureño criminal street gang at the time of Carrillo's homicide.

Defendant and Granados were both housed in an active Sureño gang pod in the county jail after their arrests, and they have had no problems while there. Defendant has sent mail to Sureño gang members housed in other sections of the jail, and he has received mail from other Sureño gang inmates. On June 20, 2006, an officer conducted a traffic stop of Mayra Acierto. In Acierto's purse, the officer found methamphetamine and papers containing defendant's name, his gang moniker "Mr. Drifter," "DBS gang," defendant's booking number[4] with the words "main jail," and similar information about Granados. In Acierto's car, the officer found Sureño gang indicia. Acierto was later convicted after jury trial of possession of methamphetamine for sale with a gang enhancement.

Fontana Police Officer Mark Gonzales testified that Sureño gang members use the number 13, and affiliate with the Mexican Mafia. The West Side Fontana Diablos is a Sureño gang with 20 to 30 members. Members of that gang have committed numerous assault-with-a-deadly-weapon offenses, as well as shootings, attempted murders, and robberies. They also align with other Sureño gangs at times to commit crimes, and they use members of other gangs as "backup," or as "the muscle." Besides the tattoo on the back of defendant's head, defendant has the number "13" tattooed on his legs, he has a "WS" tattoo, showing that he was a West Side Fontana Diablos, and his gang moniker or nickname in Fontana was "Drifter." He also has tattoos that say "sur," and "trece," which are Spanish for south and 13. In March 1998, November 1998, March 1999, and August and September 2004, defendant admitted to Fontana police officers that he was a member of the Diablos. Defendant's shaven head at the time of the 2006 shooting incident, which made his "DBS" tattoo visible, and the presence of gang photographs and writings at his residence indicated that he was still active in a Sureño gang at that time.

[4] The officer testified that defendant's booking number was "actually off by one number."

Salinas Police Officer Heath Johnson testified that the Sureños and Norteños in Salinas are rival gangs. The Norteño gangs associate with the color red, the number 14, and the Nuestra Familia prison gang. Although there are a number of different Sureño gangs, they associate with each other and they sometimes commit crimes together. They have common enemies, signs, colors, and symbols. Their primary activities are shootings, murder, drug sales, and possession of firearms. In June 2005, defendant was living at his grandmother's home with other Sureño gang members, he was wearing gang clothing, and he had his head shaved in order to display his gang tattoo, so he was still affiliating with Sureño gangs. The parties stipulated that, prior to May 14, 2006, defendant had been convicted of a felony.

Local Predicate Gang Offenses

On January 4, 2005, during an altercation between a Sureño gang member and a Norteño gang member at Northridge Mall, Hector Chavez, a different Sureño gang member, pulled out a gun and fired several rounds towards the two fighters. He struck both fighters, a security guard, and a mall patron. As a result, in November 2005, Chavez was convicted of attempted murder and gun charges with gang enhancements. On October 8, 2005, after hearing shots fired, officers stopped a car driven by Saul Granados with Gilberto Fernandez as a passenger. Both Granados and Fernandez had Sureño gang tattoos, they were wearing Sureño gang clothing, and they admitted Sureño gang membership. The officers searched the car and found a handgun in a hidden compartment. As a result, both Granados, who was also involved in the current offense, and Fernandez, who is related to defendant, were convicted of gun and gang charges in December 2005. On July 31, 2005, Alejandro Hipolito Ramirez shot at a man who was walking down the street and who police suspected was a Norteño gang member. Ramirez continued to shoot at the man after the man jumped into a car and drove away. Officers arrested Ramirez when the man spotted him later at a movie theater. In Ramirez's car were gang writings and clothing. As a result, Ramirez was convicted of attempted

murder with a gang enhancement. On July 28, 2005, Uriel Martinez, an active Sureño gang member, drove a juvenile Sureño gang member by the residence of a Norteño gang member. The Norteño gang member was outside his house and recognized the juvenile. When the Norteño gang member approached the car, the juvenile fired a shotgun at him. Martinez drove down the street, turned around and drove back by the house, and the juvenile fired again at the Norteño gang member. As a result, Martinez pleaded guilty to attempted murder with a gang enhancement.

On March 25, 2005, and again on April 8, 2005, Marco Lucas drove other Sureño gang members, including Angel Flores, around Salinas. On both dates, the group engaged in an argument with Norteño gang members in a parking lot, and one of the Sureños pulled out a gun, shot a Norteño gang member, and then left with the other Sureños in Lucas's car. As a result, both Lucas and Flores were convicted of assault with a deadly weapon and attempted murder with gun and gang enhancements. In October 2004, Sureño gang member Jesus Chuca shot into a crowd of people at a Norteño party, striking three people. He then shot at a car leaving the area. As a result, he pleaded guilty to shooting into a vehicle and to a gang crime. Chuca's cousin Steven Feigley, another Sureño gang member, walked up to a car in a grocery store parking lot and shot a Norteño gang member sitting in the driver's seat. As a result, Feigley was convicted by a jury in May 2005 of first degree murder with a firearm enhancement. On April 17, 2002, two brothers, at least one of whom was involved in Norteño gangs, were walking down the street when Miguel Rivera, a Sureño gang member, shot and killed the older brother. As a result, Rivera pleaded guilty in 2003 to murder with gun and gang enhancements.

The Defense Case

Salinas Police Detective Scott Gemette interviewed Anthony at the 7-Eleven store on May 15, 2006. Anthony said that he stayed by the cash register when the fight

escalated, that he could not hear what the fight was about, and that he could not identify the shooter.

Gutierrez, defendant's girlfriend and the mother of his child, testified that they moved in together in July 2005. Gutierrez has never been associated with gangs, but she knows how gang members dress. During the time she has known defendant, she has not seen him dress in gang attire, hang out with gang members, or do any gang activities. Granados lived close by them and defendant worked with Fernandez. Defendant obtained one tattoo since Gutierrez has known him, a tattoo of the grim reaper on his forearm. Defendant talked about his past membership in a gang in Southern California, but no gang members from Southern California visited their home. Defendant did not want to grow out his hair to cover his gang tattoo because he had bald spots. The blue bandannas found in their home after defendant's arrest were hers and she never saw defendant use them. Gutierrez uses those bandannas as well as other bandannas she owns of various colors as head bands when she participates in Aztec dancing. She never saw defendant with a gun, but she admitted that defendant was not home with her the night of the shooting.

Defendant testified in his own defense.[5] He was "jumped into" the West Side Diablos gang at the age of 14. His older brother joined the gang at the same time. Defendant got his DBS tattoo and other gang tattoos in prison in 2000 because he was proud to be a gang member at that time. He tried to disassociate himself from the gang after he was paroled in 2003, but he "was still hanging out with" his gang friends. He moved to Salinas in 2005 because he has family there and he wanted to get a job and get away from the gang lifestyle. He lived with his grandmother for a while, although other gang members were there. He brought the photo album that had some gang photos in it

[5] Defendant testified on cross-examination that he had been convicted of a felony, "willful and wanton disregard for safety [in] evading an officer."

because he cared about all the people in the photos. He did not grow his hair out as he did not like it that way because he was bald on top. He went back to Fontana to buy his gun for protection because he was being approached and harassed by Norteño gang members while at work. He knew that it was illegal for him to possess a gun.

On the night of the shooting, he spent some time with "stoners," drinking alcohol and smoking marijuana. He bought a shirt that said "So Cal," from a man he met who is known as "Happy."[6] Wearing the shirt that night signified that defendant was born and raised in Southern California, but it was not meant to signify an association with a gang. He, Granados, and Happy went to the 7-Eleven so defendant could buy a bottle of liquor for Happy as payment for the shirt. All three of them got out of their car after two men got out of a parked SUV. Defendant said "what's up" to both men, and one of the men "acknowledged" him by responding "what's up." Defendant went inside to look for the liquor. When he did not see any liquor in the store cooler, he asked the store clerk if they sold hard liquor. The clerk responded no. Carrillo came inside the store as defendant was walking back toward the door to leave. Carrillo went up to Happy. When Happy did not acknowledge Carrillo, Carrillo directed his eyes toward defendant, "mad dogging" him.[7] Defendant "mad dogged him back," and they continued to "mad dog" each other as defendant walked past Carrillo.

Defendant heard something after he walked past Carrillo. He looked back and saw Happy and Carrillo confronting each other. Carrillo smirked and said something to Happy that defendant could not hear. Happy responded to Carrillo, and the verbal confrontation appeared to heat up, so defendant walked toward them. Defendant heard

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[6] Defendant refused to give any other identifying information about the third person involved with him in the shooting incident.

[7] Defendant explained that "Mad dog is just a look, you know, that you give another person. A mean mug, a mean look."

Happy say either "Vagos" or "Sureños," and Carrillo responded "this is NSL, North Side Locos." Defendant asked, "What's up. What's going on?" Carrillo responded "What's up, bitch?" Defendant reached into his pants pocket and touched his gun to make sure it was there because he did not know what was going to happen. He said to Carrillo, "You got me fucked up," and he called Carrillo a "bitch." Carrillo said, "So what you want to do?" Defendant took a few swings at Carrillo. Defendant was upset and angry that Carrillo had called him a "bitch." There was a fight, but it was over quickly. Granados threw a floor cone toward Carrillo and everybody backed off.

As defendant and his cohorts backed out of the store, he saw Carrillo following them. Defendant thought that there was something "weird" about Carrillo's eyes, "he was, you know, psyched or loaded, or I didn't know." It looked to defendant as though Carrillo was willing to take on three people all on his own; Carrillo's friends had not attempted to help him inside the store. Therefore, defendant thought that Carrillo had a weapon. Defendant tried to put his car between himself and Carrillo but Granados and Happy were directly in front of Carrillo. Carrillo turned toward defendant, and defendant thought Carrillo was going to do something. Although defendant did not see Carrillo reach for a weapon, defendant's reaction "was just so quick." He "pulled the gun out and . . . shot." He thought that he only fired one shot, and he only intended to scare Carrillo, not kill him, but he did realize at the time that there was a good chance that he would kill somebody.

Carrillo went down and then back inside the store, and defendant left. Defendant did not know that he had killed Carrillo, he just wanted to leave so that Carrillo did not come back outside and start shooting. Defendant gave his gun to Happy. When the police arrested defendant a few days later, he knew that Carrillo was dead but he denied shooting anybody because he thought the police were trying to trick him into saying something that would help them. He later lied to the police when he said that Happy was the one who brought the gun that night. Defendant met other gang members while in

custody after his arrest and he kept in contact with them after they were sent to state prison. He used gang slogans in his letters to them and to his brothers because that is how inmates speak to each other.

Rebuttal Evidence

On May 18, 2006, when defendant was arrested, Gutierrez told Salinas Police Detective Luis Bravo that defendant had spent Sunday evening, May 14, 2006, watching rented movies with her, that he was there when she fell asleep around 9:00 p.m., and that he was there when she woke up the next morning. On May 24, 2006, Gutierrez told Detective Thomas Larkin that she and defendant went to a birthday party on the night of May 14, 2006, that they returned home around 7:30 p.m., and that she went to bed around 8:30 or 9:00 p.m. Defendant stayed up, but he was home when she woke up the next morning. After the detective showed Gutierrez the text messages she had sent defendant on his cell phone that night, she then remembered what she had done that evening.

Verdicts, Motion for New Trial, and Sentencing

On June 16, 2008, the jury found defendant guilty of second degree murder (§ 187) and unlawful possession of a firearm (§ 12021, subd. (a)(1)). The jury further found that defendant personally used a firearm in the commission of the murder (§ 12022.53, subd. (d)), and that both offenses were committed for the benefit of or in association with the Sureño criminal street gang (§ 186.22, subd. (b)). On July 17, 2008, defendant filed a motion for new trial with a sentencing memorandum.

On July 29, 2008, in case No. SS061706A, the trial court denied the motion for new trial and sentenced defendant to 46 years to life in prison. The sentence consists of the middle term of two years for the weapons offense, plus three years for the gang enhancement, consecutive to 15 years to life for the murder, 25 years to life for the firearm enhancement, and one year for the prison prior. The court also imposed a $10,000 restitution fine and a suspended parole revocation restitution fine of the same amount. In case No. SS051910A, defendant entered a negotiated guilty plea to

possessing methamphetamine for sale, and the court sentenced defendant to prison for two years, the sentence to run concurrent with the previously imposed sentence. The court also imposed a $400 restitution fine and a suspended parole revocation restitution fine of the same amount.

DISCUSSION

CALJIC No. 2.71

Anthony testified that defendant said, "let's take this outside" following the short fight between Carrillo and two men from the Jeep. No other witness testified to hearing the statement, and defendant specifically testified that he did not hear anybody make the statement. Consequently, defendant contends that he was deprived of the effective assistance of counsel by counsel's failure to request CALJIC No. 2.71, a cautionary instruction, regarding Anthony's testimony. Alternatively, defendant contends that the trial court prejudicially erred in failing to give that instruction or a similar one sua sponte. "If the jury believed Anthony's testimony, a conviction was a foregone conclusion. Obviously, if [defendant] invited Mr. Carrillo to come 'outside,' he did so with the intent to shoot him. Since [defendant] testified to the contrary, it was imperative that the jury be told that Anthony's testimony had to be viewed with caution. The failure to so advise the jury effectively doomed the defense case."

CALJIC No. 2.71 states: "An admission is a statement by [a][the]defendant which does not itself acknowledge [his][her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his][her] guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part. [¶] [Evidence of an oral admission of [a][the] defendant not made in court should be viewed with caution.]"[8]

[8] CALJIC No. 2.71 is embodied in CALCRIM No. 358, which now states: "you have heard evidence that the defendant made [an] oral or written statement[s] (before the

CALJIC No. 2.71 or a similar instruction should be given sua sponte when there is evidence of a defendant's admission and the admission is used to prove a part of the prosecution's case. (*People v. Beagle* (1972) 6 Cal.3d 441, 455; *People v. Marks* (1988) 45 Cal.3d 1335, 1346; *People v. Shoals* (1992) 8 Cal.App.4th 475, 498.) An admission is an extrajudicial statement by the defendant—inculpatory or exculpatory—which tends to prove his or her guilt when considered with the rest of the evidence in the case. (*People v. McClary* (1977) 20 Cal.3d 218, 230, overruled on another ground in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17; *People v. Mendoza* (1987) 192 Cal.App.3d 667, 676; *People v. Brackett* (1991) 229 Cal.App.3d 13, 19-20.) The extrajudicial statement may have been made "before, during, or after the crime." (*People v. Carpenter* (1997) 15 Cal.4th 312, 393.)

While it is error for a court to fail to give CALJIC No. 2.71 or a similar instruction whenever an extrajudicial statement by the defendant is admitted and the prosecution relies on it to establish the defendant's guilt, the failure to do so "does not constitute reversible error if upon a reweighing of the evidence it does not appear reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. [Citations.]" (*People v. Beagle, supra*, 6 Cal.3d at pp. 455-456; *People v. Carpenter, supra*, 15 Cal.4th at p. 393.) "Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words

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trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s]. [¶] [Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]"

used, their meaning, or whether the admissions were repeated accurately. [Citations.]" (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1268; see also *People v. Stankewitz* (1990) 51 Cal.3d 72, 94.) The prejudice attributable to the lack of a cautionary instruction is in proportion to the importance of the defendant's admission to the prosecution's case. (*People v. Deloney* (1953) 41 Cal.2d 832, 840; *People v. Lopez* (1975) 47 Cal.App.3d 8, 14.) The error is harmless where there was " 'no evidence that the statement was not made, was fabricated, or was inaccurately remembered or reported.' " (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 393.)

"To establish a violation of the constitutional right to effective assistance of counsel, a defendant must not only 'identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,' but he or she must also show that counsel's deficient performance 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' (*Strickland v. Washington* (1984) 466 U.S. 668, 686, 690; see also *People v. Kipp* (1998) 18 Cal.4th 349, 366.)" (*People v. Earp* (1999) 20 Cal.4th 826, 870.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, *supra*, 466 U.S. at p. 694.)

In this case, even if the trial court erred by failing to give sua sponte, and counsel rendered deficient performance by failing to request, CALJIC No. 2.71 or a similar instruction, we find no reversible error. This is not a case in which the parties presented conflicting evidence as to the precise words allegedly spoken by defendant, their meaning or context, or whether they were accurately remembered or reported. Only one witness, Anthony, testified as to the statement allegedly made by defendant, and the court gave various instructions pertaining to witness credibility, so the jury was provided guidance on how to determine whether or not to credit Anthony's testimony concerning

defendant's alleged statement.[9] The store surveillance videos of the entire incident were shown to the jury and defendant did not dispute that he checked his gun before he exited the store or that he shot Carrillo within seconds of when Carrillo followed him outside the store even though he never saw Carrillo with a weapon. Therefore, based on a careful review of the record, we conclude that defendant was not prejudiced by the failure of the trial court to give CALJIC No. 2.71 or a similar instruction. It does not appear reasonably probable that a result more favorable to defendant would have been reached in the absence of the error (see *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 392-393; *People v. Beagle*, *supra*, 6 Cal.3d at pp. 455-456), and there is not a reasonable probability that, but for counsel's failure to request the instruction, the result of the proceeding would have been different (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694).

CALCRIM No. 3472

Defendant's theory of the case was that he was acting in self defense when he shot Carrillo. Defendant testified that he took the first swing at Carrillo, that he and his cohorts retreated from the store after the brief scuffle that ensued, that Carrillo followed them outside with a "weird" look in his eyes, and that Carrillo appeared to want to take on all three men, so defendant thought Carrillo was armed even though he did not see Carrillo with any weapon. At the prosecutor's request, the court instructed the jury with CALCRIM Nos. 3471, 3472, and 3474. Defendant contends on appeal that he was deprived of due process by the giving of CALCRIM No. 3472. He argues that the "plain effect of" CALCRIM No. 3472 "was to advise the jury to disregard [his] claim of self

[9] The jury was instructed with CALCRIM No. 105 on the factors to consider in evaluating the credibility and believability of witnesses, with CALCRIM No. 301 on the sufficiency of testimony of one witness and the need to carefully review all the evidence, with CALCRIM No. 302 on evaluating conflicting evidence, and with CALCRIM No. 318 on how to use evidence of a statement that a witness made before the trial.

defense if it was determined that he had initiated a 'quarrel.' " "However, unbeknownst to the trial court, CALCRIM [No.] 3472 does not constitute a correct statement of the law." Defendant further contends that CALCRIM No. 3471 and CALCRIM No. 3472 "gave conflicting guidance to the jury," and that "[s]ince this court 'has no way of knowing which of the two irreconcilable instructions' was followed by the jury, error must be found."

The court instructed the jury pursuant to CALCRIM Nos. 3471, 3472, and 3474 as follows: "A person who engages in mutual combat or who is the first one to use physical force has a right to self-defense only if, one, he actually and in good faith tries to stop fighting; two, he indicates by word or by conduct to his opponent in a way that a reasonable person would understand that he wants to stop fighting and that he has stopped fighting; and, three, he gives his opponent a chance to stop fighting. If a person meets these requirements, he then has a right to self-defense if the opponent continues to fight. [CALCRIM No. 3471.] [¶] A person does not have the right to self-defense if she or he provokes a fight or quarrel with the intent to create an excuse to use force. [CALCRIM No. 3472.] The right to use force in self-defense continues only as long as the danger exists or reasonably appears to exist. When the attacker no longer appears capable of inflicting any injury, then the right to use force ends. [CALCRIM No. 3474.]"[10]

As defendant acknowledges, in *People v. Hecker* (1895) 109 Cal. 451, our Supreme Court set forth the circumstances in which a wrongful aggressor can gain a right of self-defense against his victim. The court stated: "The acts which a defendant may do and justify under the plea of self-defense depend primarily upon his own conduct, and secondarily upon the conduct of the deceased. There is no fixed rule applicable to every

[10] The court also instructed the jury with CALCRIM No. 505 [justifiable homicide: self-defense or defense of another] at defendant's request.

case, though certain general principles, well established, stand forth as guides for the action of men and measures for the jury's determination of their deportment." (*Id*. at p. 462.) The court then recited five general principles, the first being: "Self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus, through his fraud, contrivance, or fault, to create a real or apparent necessity for killing." (*Ibid*.) Relying on this principle, defendant argues that CALCRIM No. 3472 is an incorrect statement of the law because "a person who seeks a quarrel loses his right to self defense only when he seeks to force a 'deadly issue.' "

We disagree with defendant's premise. The *Hecker* court stated that a defendant does not have the right to claim self-defense when he or she contrives a necessity for using deadly force. Likewise, an initial aggressor has no right to claim self-defense when he or she contrives a necessity for using force by provoking a fight. As our Supreme Court more recently stated: "It is well established that the ordinary self-defense doctrine—applicable when a defendant reasonably believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified." (*In re Christian S*. (1994) 7 Cal.4th 768, 773, fn. 1.) Thus, CALCRIM No. 3472 correctly informed the jury that defendant did not have the right to invoke the defense of self-defense if he provoked a fight with Carrillo with the intent to create an excuse to use any force, whether it be deadly or non-deadly force.

As CALCRIM No. 3472 as given by the court is a correct statement of the law, defendant does not contest the correctness of either CALCRIM No. 3471 or CALCRIM No. 3474, and these three instructions together with CALCRIM No. 505 adequately instructed the jury on defendant's theory of self-defense, we find no instructional error.

Excluded Evidence

In his motions in limine, defendant sought in part to admit evidence of Carrillo's felony conviction for gun possession. Carrillo had been convicted by no contest plea of carrying a loaded firearm with a criminal street gang enhancement. (§§ 12031, subd. (a)(1), 186.22, subd. (b)(1).) Defendant argued that Carrillo's "prior gun conviction both impeaches the two witnesses who were with him, [and] lends support to defendant's claim of self defense." The prosecutor opposed the motion. "There is simply no authorization for the use of a felony conviction to somehow impeach another witness, or to buttress a defense." "What the defendant essentially seeks to do is support his purported belief in the need to defend himself with lethal force with a fortuitous circumstance (the victim's prior conviction) which the defendant did not know about at the time of the crime, and which he therefore could never have thought about at the time of the killing." The prosecutor also sought to exclude under Evidence Code section 352 evidence about the methamphetamine in Carrillo's blood at the time of his death as well as testimony by Dr. Reidy, a psychologist who defendant wanted to call as a witness, about the effects of methamphetamine on the body and the correlation with violent behavior. Defendant argued that "[t]he expert can't say in this case the guy clearly acted a certain way. He can say what meth can often do. . . . And an expert is needed, because the jurors may not understand what qualities meth has and what it can do to people. And they can then look at the evidence[,] listen to it and decide."

The court admitted evidence of the test results showing the presence of methamphetamine in Carrillo's blood at the time of his death. However, the court excluded Dr. Reidy's testimony. "I don't believe that's relevant or admissible, . . ." The court also excluded evidence of Carrillo's prior conviction under Evidence Code section 352. "[I]n my way of thinking, it doesn't even show that they were an aggressor. Simply possessing. There is no evidence that the firearm was used in a violent way; was used in

connection with any crime other than the gang enhancement allegation, and I think by itself, that's not enough to allow it in this case."

At trial, Dr. John Hain, who performed the autopsy on Carrillo, testified on cross-examination that Carrillo had "an extremely high amount of methamphetamine" in his blood at the time of his death. He further testified that the amount found in Carrillo could "contribute to the way the person acts," but that he could not "tell how [Carrillo's] behavior normally is or how he's necessarily behaving as a result of the methamphetamine."

In his new trial motion, defendant argued in part that the court erred in prohibiting the testimony of Dr. Reidy on the issue of the effects of methamphetamine on Carrillo's conduct, as the evidence would have supported defendant's testimony that Carrillo was aggressive and unreasonable in provoking the incident that led to his death. Defendant also argued that Carrillo's prior felony conviction should have been admitted, as it would have supported defendant's testimony that he acted in self defense because he felt certain that Carrillo had a gun, and the evidence was admissible pursuant to article I, section 28, subdivisions (d) and (f) of the California Constitution. In denying the motion for new trial, the court stated: "In addition to what I originally stated at the time of making my rulings, Dr. H[ain] did testify on the matters that Dr. Reidy would have testified for had he been allowed to testify, so it actually came in through a different witness anyway. So there was no prejudice, even if I made an error of excluding [Dr. Reidy's] testimony on that matter. [¶] And as to the decedent's prior conviction, had the defendant been aware of that, then the defense argument that that evidence should have come in would have some merit, but the defendant had no knowledge of that prior conviction to support his belief that there was a gun. So it just wasn't relevant for the issue and I think I properly exclude[d] that."

Defendant now contends that he was deprived of due process and the right to call witnesses on his behalf when the court excluded the testimony of Dr. Reidy and the

evidence of Carrillo's prior felony weapon possession conviction. He argues that this evidence was relevant as it would have supported his theory that he reasonably acted in self defense due to both Carrillo's propensity to act violently and his use of methamphetamine on the night in question.

Article I, section 28, subdivision (d) of the California Constitution, popularly known as Proposition 8, prohibits the exclusion of relevant evidence in criminal proceedings, unless the evidence is otherwise inadmissible under certain rules of evidence, including under Evidence Code sections 352 and 1103. " 'It has long been recognized that where self-defense is raised . . . evidence of the aggressive and violent character of the victim is admissible.' [Citations.] Under Evidence Code section 1103, such character traits can be shown by evidence of specific acts of the victim on third persons as well as by general reputation evidence." (*People v. Wright* (1985) 39 Cal.3d 576, 587.)

Evidence Code section 1103, subdivision (a)(1) states: "In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character." "The admission of such character evidence, however, is not without bounds, but is subject to the dictates of Evidence Code section 352." (*Wright*, *supra*, 39 Cal.3d at p. 587.) Under Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues or of misleading the jury."

"Broadly speaking, an appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion. [Citation.] Specifically, it scrutinizes a

decision on a motion to bar the introduction of evidence as irrelevant for such abuse: it does so because it so examines the underlying determination whether the evidence is indeed irrelevant. [Citation.]" (*People v. Alvarez* (1996) 14 Cal.4th 155, 201; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 609; *People v. Smith* (2003) 30 Cal.4th 581, 627 (*Smith*).)

Evidence of Carrillo's prior conviction for possession of a loaded firearm with a gang enhancement does not, by itself, describe a character trait. It establishes the fact of gang membership while possessing a loaded firearm, and, as the court in *People v. Perez* (1981) 114 Cal.App.3d 470, 477, stated, "Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion." (Accord, *In re Wing Y.* (1977) 67 Cal.App.3d 69, 79.) The trial court made this point in its ruling on the motion for new trial when it found that the evidence would not tend to show that Carrillo had ever used a gun in an aggressive or violent way. Also, defendant offered no evidence that he knew Carrillo, or of him, prior to the shooting incident, so that he was aware of any reputation Carrillo may have had for possessing a loaded firearm. Accordingly, the court did not abuse its discretion in excluding evidence of Carrillo's prior conviction.

"Expert opinion testimony must be '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . .' (Evid. Code, § 801, subd. (a).)" (*Smith, supra*, 30 Cal.4th at p. 627.) Defendant cites *People v. Bui* (2001) 86 Cal.App.4th 1187, 1194-1197, a case finding that the court did not abuse its discretion in admitting an expert's testimony on the effects of methamphetamine on behavior, in support of his contention that the trial court here erred in excluding such evidence. However, "the fact that evidence is admitted in one trial does not mean it must be admitted in another. . . . The circumstances in which evidence is offered and its exact nature, and the exercise of the trial court's discretion, can vary from case to case." (*Smith, supra*, 30 Cal.4th at p. 627.) In *Bui*, the defendant

was convicted of vehicular manslaughter while driving under the influence of a drug (§ 192, subd. (c)(3)), and the expert had testified as to whether a person's ability to drive a motor vehicle would be impaired by the amount of methamphetamine found in the defendant's blood as well as other symptoms the defendant exhibited after the accident. (*Bui, supra*, 86 Cal.App.4th at p. 1187.) In this case, Dr. Hain testified that he could not tell how Carrillo "necessarily behaved" due to his methamphetamine use. Other than the amount of methamphetamine found in Carrillo's blood at the time of his death, the only testimony about Carrillo's symptoms of methamphetamine use was defendant's testimony that there was something "weird" about Carrillo's eyes. The store surveillance videos showed Carrillo's actual behavior during the incident. Thus, Dr. Reidy's opinion would not have assisted the trier of fact (Evid. Code, § 801, subd. (a)), and the court did not abuse its discretion in excluding his proffered testimony.

CALCRIM No. 570

Based on defendant's testimony that he was upset and angry that Carrillo had called him a "bitch," defendant requested and the trial court instructed the jury with CALCRIM No. 570 as follows: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if, one, the defendant was provoked; two, as a result of the provocation the defendant acted [rashly] and under the influence of the intense emotion that obscured his reasoning or judgment; and, three, the provocation would have caused a person of average disposition to act [rashly] and without due deliberation. That is from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I will define for you. No specific type of provocation is

required. Slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. It is not enough that the defendant simply was provoked. [¶] The defendant is not allowed to set up his own standard of con[duct]. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked *and how such a person would react in the same situation, knowing the same facts*. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as a result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." (Italics added.)

The prosecutor argued to the jury: "There is no heat of passion here. No reasonable person would have been so upset with either the words exchanged or little bitty fist fight that you see that they would just be so blown out of the water they had to kill somebody. And he doesn't even claim that he did that. He said as far as he was concerned, the fight was over."

Defendant now contends that the italicized language in the court's instruction above constitutes an erroneous statement of the law.[11] "Contrary to the instruction, the jury is not to consider whether the killer's reaction was reasonable. Rather, the only inquiry committed to the jury's consideration is whether the decedent's conduct reasonably caused the killer to be provoked. If the jury finds that the killer was reasonably provoked, it must then necessarily return a voluntary manslaughter verdict even if the homicidal act is deemed to be an unreasonable reaction." "Mr. Carrillo engaged in a sequence of behavior which would reasonably cause a person to lose his

[11] CALCRIM No. 570 was amended after defendant's trial and now provides: "In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment."

cool. First, Mr. Carrillo mad dogged [defendant] without cause. Mr. Carrillo then confronted [defendant]'s companion, Happy. Soon thereafter, Mr. Carrillo incited [defendant] by calling him a 'bitch.' Finally, Mr. Carrillo pursued [defendant] outside. Under these circumstances, the jury could easily have returned a verdict of voluntary manslaughter."

"An unlawful killing with malice is murder. (§ 187.) Nonetheless, an intentional killing is reduced to voluntary manslaughter if other evidence negates malice. Malice is presumptively absent when the defendant acts upon a sudden quarrel or heat of passion on sufficient provocation (§ 192, subd. (a)), or kills in the unreasonable, but good faith, belief that deadly force is necessary in self-defense. [Citation.]" (*People v. Manriquez* (2005) 37 Cal.4th 547, 583.) "An intentional, unlawful homicide is 'upon a sudden quarrel or heat of passion' [citation], and is thus voluntary manslaughter [citation], if the killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an ' "ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." ' [Citations.] ' "[N]o specific type of provocation [is] required . . . ." ' [Citations.] Moreover, the passion aroused need not be anger or rage, but can be any ' " '[v]iolent, intense, high-wrought or enthusiastic emotion' " ' [citations] other than revenge [citation]." (*People v. Breverman* (1998) 19 Cal.4th 142, 163; see also *Manriquez, supra*, 37 Cal.4th at pp. 585-586 [the provocative conduct may be verbal as long as it is such that an average, sober person would be so inflamed that he or she would lose reason and judgment].)

In this case, defendant argues that "a jury could easily have returned a verdict of voluntary manslaughter" based on Carrillo's behavior of "mad dogging" defendant, calling defendant a "bitch," then following defendant outside, and that this behavior would so inflame an ordinary person that he or she would lose reason and judgment. The Fourth District Court of Appeal addressed a similar situation in *People v. Najera* (2006)

138 Cal.App.4th 212 (*Najera*). In that case, the defendant was sitting, drinking beer, and joking around with Victor Hernandez in front of the house where they both rented rooms, when Hernandez called the defendant a " 'jota' " (translated as "faggot"). After the defendant objected and Hernandez again called the defendant a " 'fag,' " Hernandez stood up and pushed the defendant. The defendant fell back, then got up and fought with Hernandez. Name calling went back and forth and the two became increasingly angry. They were separated by a neighbor. Hernandez remained in the front yard and the defendant went inside. After being inside for about five to ten minutes, during which time he went into the bathroom, kitchen, and his bedroom, the defendant returned to the front yard. He walked straight to Hernandez and slashed him in the stomach three times with a knife he had taken from the kitchen. (*Id*. at pp. 216-217.)

Hernandez died from his injuries, and the defendant was prosecuted for first degree murder. The trial court instructed the jury on heat of passion voluntary manslaughter, and the jury convicted the defendant of second degree murder. On appeal, the defendant contended in part that the prosecutor had committed prejudicial misconduct in his arguments to the jury about provocation. (*Najera*, *supra*, 138 Cal.App.4th at p. 223.) However, defendant's trial counsel had not objected to any of the challenged statements. (*Id*. at p. 224.) The defendant, therefore, argued that his trial counsel was ineffective by failing to object to the misstatements or by failing to request that the misstatements be corrected. (*Id*. at p. 225.) The appellate court found that the defendant was not entitled to an instruction on manslaughter. " ' "[W]ords of reproach, however grievous they may be, or gestures, or an assault, or even a blow, is not recognized as sufficient to arouse, in a reasonable man, such passion as reduces an unlawful killing with a deadly weapon to manslaughter." ' [Citation.]" (*Id*. at p. 226.) The court further found that the defendant's trial counsel's failure to object to the prosecutor's argument was not prejudicial. (*Id*. at p. 228.)

There was more evidence of provocation in *Najera* than there was here, yet the *Najera* court found that it was insufficient to justify voluntary manslaughter instructions because the objective component of heat of passion was not supported by adequate evidence. This objective component depends on whether an ordinary person "would be so inflamed that he or she would lose reason and judgment." (*Manriquez, supra,* 37 Cal.4th at p. 586.) Najera's victim owed him money, called him a "faggot," and pushed him. In this case, defendant did not know Carrillo but Carrillo "mad dogged" defendant, called defendant a "bitch," and followed him outside. Based on *Najera,* we find that no rational juror could have concluded that the name-calling in this case would cause an ordinary person to become so inflamed that he lost reason and judgment and would have reacted from passion rather than from judgment. Consequently, voluntary manslaughter instructions were not merited, and any instructional error regarding CALCRIM No. 570 could not have prejudiced defendant. Even if we were to find that voluntary manslaughter instructions were merited in this case, after reviewing the entire record, we find that it is not reasonably probable the jury would have reached a more favorable result had the current version of CALCRIM No. 570 been given. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Gang Evidence

In his motions in limine, defendant sought to exclude or limit the admission of gang evidence. Relevant here, defendant sought to exclude evidence that he was present on March 7, 1999, when a fellow gang member shot a rival gang member; and he was present on March 1, 1998, and November 6, 1998, when guns and/or ammunition were found in the car in which he was a passenger. Defendant also sought to limit the number of prior offenses offered to prove the predicate offenses element of the criminal street gang enhancement, arguing that only "one or two" were required, and that any more would be "cumulative and prejudicial." The court ruled that the prosecution could introduce evidence of all the offenses it listed in its trial brief. "I believe the predicate

offenses are admissible in their entirety, unless there's another specific objection to be raised by the defense as to a particular portion of any of the reports or other specific references in the items that are listed there." The prosecution then presented testimony regarding eight predicate gang offenses as described in the prosecution's case above.

Defendant now contends that he was deprived of a fair trial "due to the trial court's failure to impose a reasonable limitation on the volume and nature of the gang evidence." "The use of eight separate predicate offenses was cumulative overkill." Specifically, he contends that court erred by allowing admission of the three predicate offenses described here.

The prosecution had the burden of proving the gang enhancement beyond a reasonable doubt. To do this, the prosecution had to prove, in part, a "pattern of criminal gang activity." (§ 186.22, subd. (f); *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322.) The prosecution proves a pattern of criminal gang activity by showing the commission or attempted commission of, or conviction for "two or more" enumerated offenses "committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e); *People v. Loeun* (1997) 17 Cal.4th 1, 4.) Thus, the testimony about all eight local predicate gang offenses was admissible if it was "not more prejudicial than probative and [was] not cumulative. [Citation.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223; Evid. Code, § 352.) For Evidence Code section 352 purposes, "prejudicial" is not synonymous with "damaging," but refers instead to evidence that uniquely tends to invoke an emotional bias against the defendant without regard to its relevance on material issues. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) "Although no bright-line rules exist for determining when evidence is cumulative, we emphasize that the term 'cumulative' indeed has a substantive meaning, and the application of the term must be reasonable and practical." (*People v. Williams* (2009) 170 Cal.App.4th 587, 611.) A trial court's ruling on the admission of gang testimony is reviewed for abuse of discretion. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.)

The testimony about the three predicate offenses at issue here was not more inflammatory than the testimony about defendant's and his cohorts' conduct during the shooting incident. The trial court was acting well within its broad discretion in overruling any evidentiary objection to the testimony about the three predicate offenses because it was relevant to the gang enhancement allegation and was not unduly prejudicial. (See *People v. Valdez* (1997) 58 Cal.App.4th 494, 511.) In addition, although testimony about five other predicate offenses was presented, the testimony regarding the three at issue did not "necessitate undue consumption of time." (Evid. Code, § 352.) The testimony regarding all eight predicate offenses entailed only eight pages of the entire trial transcript. (Compare *People v. Williams*, *supra*, 170 Cal.App.4th at pp. 610-611.) Even without the predicate offenses at issue here, the evidence overwhelmingly established defendant's guilt of the substantive offenses and the truth of the gang enhancement allegations. Therefore, it is not reasonably probable that the jury would have returned verdicts more favorable to defendant had the testimony of any or all three of the predicate offenses at issue been excluded. (*Id*. at p. 613; *People v. Leon* (2008) 161 Cal.App.4th 149, 169-170.) No violation of defendant's right to a fair trial has been shown.

Cumulative Prejudice

Defendant contends that the judgment must be reversed due to the cumulative effect of the above alleged errors. "Absent the numerous errors which had significant influence on the jury, it is likely that a murder conviction would not have been returned." Our Supreme Court has recognized that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) As we discussed above, we find that any instructional error was harmless, and that the court did not abuse its discretion regarding the admission or exclusion of any evidence. Accordingly, we find no cumulative error requiring reversal.

The Prison Prior Enhancement

Prior to trial, defendant's counsel informed the court that defendant was "prepared to admit the prior conviction for purposes of the [section 667.5, subdivision (b)] enhancement at this time, as well as I believe for the [section] 12021 charge." Before accepting the admission, the court informed defendant that he had "a right to a trial by the jury to determine whether or not you are a convicted felon, having been previously convicted of possession of a controlled substance, in violation of [section] 11377 of the Health and Safety Code on January 29th, 1999. Do you understand that right?" Defendant answered affirmatively. The court asked again, "If you admit this prior felony conviction, you're giving up the right to a jury trial on that issue. Do you understand that?" Again defendant answered affirmatively. The court then asked, "And by admitting this prior felony conviction, if the jury convicts you of the charges, this would be a basis for enhancing your sentencing. Do you understand that?" Defendant answered, "Yes, Your Honor." The court asked, "And realizing that there's potential consequences, one, you could be convicted of being a felon in possession of a firearm, two, that the prior prison term could increase the penalties if you are found guilty of any of the charges, do you admit -- [¶] . . . [¶] -- the prior prison term and felony conviction of January 29, 1999, having been convicted of a crime of possession of a controlled substance, in violation of [section] 11377 of the Health and Safety Code?" Again defendant answered, "Yes, Your Honor." Defendant then specifically admitted that he had a prior prison term arising out of his January 29, 1999 conviction for violating Health and Safety Code section 11377. After counsel joined "in the waiver the jury trial on those issues," the court found that defendant "voluntarily and intelligently waived [his] right to a jury trial" and "admitted" the allegations.

Defendant now contends that the section 667.5 enhancement must be reversed because the court failed to advise him of his rights to remain silent and to confront witnesses in addition to his right to a jury trial. Acknowledging that the record shows

that he sustained prior convictions in 1998, 1999, 2002, and 2004, defendant nevertheless argues that there is no showing that he ever actually either previously exercised or received an advisement concerning his rights to remain silent and confront witnesses. (See *People v. Mosby* (2004) 33 Cal.4th 353, 359-364 (*Mosby*).) He also argues that, even if he had been previously advised of those rights, his 2008 admission "was almost four years after his last experience with the criminal justice system."

In *Mosby*, the defendant was advised of his right to a jury trial but was not advised of his rights to remain silent and to confront witnesses against him. (*Mosby*, *supra*, 33 Cal.4th at pp. 357-358.) On appeal, the defendant contended that the trial court's incomplete advisement of rights rendered his admission of a prior conviction invalid. However, our Supreme Court stated that a defendant's prior experience with the criminal justice system was relevant to whether he or she knowingly waived constitutional rights and pointed out that the defendant had just sat through an entire trial. Applying the totality of circumstances test, the *Mosby* court concluded that the "defendant voluntarily and intelligently admitted his prior conviction despite being advised and having waived only his right to a jury trial." (*Id*. at p. 365.) " '[H]e knew he did not have to admit [the prior conviction] but could have had a jury or court trial, had just participated in a jury trial where he had confronted witnesses and remained silent, and had experience in pleading guilty in the past, namely, the very conviction he was now admitting.' " (*Ibid*.)

Defendant agrees that the totality-of-the-circumstances test applies, but argues that this case is more similar to *People v. Christian* (2005) 125 Cal.App.4th 688 (*Christian*), in which the appellate court concluded that the record failed to demonstrate that the defendant entered his plea "understandingly and voluntarily" and reversed the judgment. (*Id*. at pp. 698-699.) In *Christian*, the defendant entered a plea to the substantive offense and admitted the prior conviction allegations. The appellate court scrutinized the entire record but found no facts detailing the circumstances of defendant's prior convictions or

demonstrating that defendant was aware of and comprehended his constitutional rights. (*Id*. at p. 697.)

In contrast to the record in *Christian*, the record in this case shows that defendant was aware of his constitutional rights to confront witnesses and not to incriminate himself. Prior to this case, defendant had served a two-year prison term beginning in 1999, and he had been returned to prison four separate times for violating his parole, although the record does not indicate whether defendant's prior convictions and parole revocations were after trial or by plea. In this case, defendant admitted the prior allegations when he was dressed out for trial and after hearing that Anthony and Ricardo were present and ready to testify. Defense counsel informed the prosecutor and the court that defendant intended to testify, and the court stated that the prior conviction that defendant had that had resulted in the prison sentence was a crime of moral turpitude that could be used to impeach defendant if he chose to testify. The court asked defense counsel whether he had discussed with defendant his willingness to admit the prior in advance of selecting the jury and counsel stated he had. The court then advised defendant as outlined above, and later, during defendant's trial testimony, defendant admitted that he was convicted of the offense that underlies his prison prior. Thus, the record demonstrates that, under the totality of the circumstances, defendant admitted the prior while knowing of and intending to waive his rights to a jury trial, to confront witnesses, and to remain silent. (*Mosby*, *supra*, 33 Cal.4th at p. 365.) Accordingly, the admission was intelligent and voluntary (*ibid*.), and we need not strike the prior enhancement.

Restitution Fines

The court imposed a $10,000 restitution fine, and similar suspended parole revocation fine, in case No. SS061706A, and a $400 restitution fine, and similar suspended parole revocation fine, in case No. SS051910A. Defendant did not object at

sentencing when the court imposed the two restitution fines for the two cases. He now contends that the trial court erred by imposing multiple restitution fines.

Section 1202.4, subdivision (b), and section 1202.45 require a court to impose the restitution fines in "every case where a person is convicted of a crime." The question here is whether defendant was convicted in one case or two cases. In support of defendant's claim that this was only one case, defendant cites *People v. McNeely* (1994) 28 Cal.App.4th 739 (*McNeely*) and *People v. Ferris* (2000) 82 Cal.App.4th 1272 (*Ferris*). In *McNeely*, the defendant pleaded guilty to numerous burglary offenses charged in two separate cases with separate case numbers. At sentencing for both cases, the trial court imposed an aggregate term that included all counts and ordered the defendant to pay $93,000 in restitution to the victims pursuant to the 1989 version of Government Code section 13967, subdivision (c). At the time, that statute provided that restitution had to be ordered in the amount of the loss, not to exceed $10,000. On appeal, the People conceded that the $93,000 violated Government Code section 13967 but argued that two restitution fines could be imposed under that section since the defendant had been sentenced on two cases at the sentencing hearing. The appellate court rejected this argument, noting that Government Code section 13967 "did not give the court authority to order restitution up to $10,000 for each victim or on each count. Nor did it allow a restitution order exceeding $10,000 where, as here, a defendant is sentenced in one hearing on two or more cases." (*McNeely*, *supra*, 28 Cal.App.4th at p. 743.) The appellate court's holding in *McNeely* has no bearing in our case, which involves different statutes. Here, sections 1202.4 and 1202.45 provide specific authority for issuing a restitution order "in every case" in which the defendant has been convicted.

In *Ferris*, the prosecutor moved to join for trial two separately filed cases charging the defendant with different offenses committed at different times. The trial court granted the motion but the informations were not formally consolidated and the cases retained separate case numbers in the jury verdicts. Separate probation reports were

prepared as well. In a single sentencing hearing, the court sentenced the defendant on all charges and ordered him to pay two restitution fines, one for each case. The appellate court reversed, concluding that the phrase "every case" in section 1202.4, subdivision (b), and section 1202.45, "includes a jointly tried case although it involves charges in separately filed informations." (*Ferris, supra,* 82 Cal.App.4th at p. 1277.) The court found that the charges were "effectively joined" in one case although they technically retained separate case numbers. (*Ibid.*)

Unlike *Ferris*, the two cases before us were never joined or consolidated, but rather remained separate cases throughout the proceedings. Although both cases were included in one sentencing hearing, a trial court, as the *McNeely* court recognized, "can separately sentence a defendant on different cases at a single hearing." (*McNeely, supra,* 28 Cal.App.4th at p. 743.) The fact that there was a common hearing for the sentencing in case No. SS061706A and the entry of the negotiated plea and sentencing in case No. SS051910A does not mean that the two cases were "effectively joined." (*Ferris, supra,* 82 Cal.App.4th at p. 1277.) Calendaring and hearing more than one case for a defendant at the same time does not result in " 'de facto' consolidation." (*People v. Gonzales* (1990) 220 Cal.App.3d 134, 143.) "Obvious considerations of judicial efficiency call[] for that type of processing the multiple cases of a single defendant." (*People v. Smith* (1992) 7 Cal.App.4th 1184, 1192.)

Here, defendant was convicted of crimes in two cases arising from incidents that occurred 11 months apart. The cases were charged separately under case numbers that differed significantly. The offenses committed in each case were unrelated and pertained to different conduct in different locations. Defendant was convicted after a jury trial in one case and entered a negotiated guilty plea in the other case. Defendant was sentenced separately on each case under its respective number, and separate minute orders were filed in each case. We conclude that these were two cases and that the trial court did not err in imposing separate restitution fines pursuant to sections 1202.4 and 1202.45 in each

case. (See also *People v. Enos* (2005) 128 Cal.App.4th 1046, 1049; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 864-865.)

DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

_____
MCADAMS, J.